No. 4035

United States
Circuit Court of Appeals
For the Ninth Circuit.

ALBERT STEFFEN,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

JOHN S. COKE,
United States Attorney,

THOS. H. MAGUIRE,
Assistant United States Attorney,

Attorneys for Defendant in Error.

INDEX OF AUTHORITIES

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STATEMENT OF CASE.

Counsel for Plaintiff in Error, hereinafter called "defendant," has in his brief correctly stated the charge upon which defendant was tried and the dates of all proceedings herein. There has been filed with the Court a typewritten transcript of the testimony and proceedings held at the trial and it is to that transcript we refer in the discussion of the testimony and proceedings.

Counsel is in error when he states in Page 3 of his

brief that no motion was made at the close of the defense for a directed verdict of not guilty, as on Page 85 of the transcript the following is found:

> "Mr. Long: (Then attorney for Steffen) I would like at this time to ask the Court to instruct the Jury to bring in a verdict of acquittal in favor of Mr. Steffen for the reason that the allegations of the complaint have not been proved.
>
> "Court: Overruled * * *
>
> "Mr. Long: May I have an exception to that * * *
>
> "Court: Yes."

It is obvious from the above that defendant's rights were not waived by his counsel and this matter is called to the attention of the Court in due fairness to the defendant, that his rights will not be prejudiced by an oversight on the part of his present counsel.

The testimony adduced at the trial of this case is in brief as follows:

On July 19, 1922, at about 12:30 A. M., a police officer of the City of Portland, while passing a building located at 1094 Hawthorne Avenue, Portland, wherein a Drug Store used in part as Post Office Substation 22 is located, noticed defendant standing in a hallway of said building opening out on to a side street. Defendant's actions aroused the suspicions of the officer; he stopped and questioned him and defendant stated that he was looking for a party named Rogers, who lived in the apartments overhead. The officer being familiar with the neighbor-

hood, stated that there was no such man living there and defendant insisted that an automobile standing at the curb belonged to Rogers, upon which the officer contradicted him again. He then searched the defendant for firearms and found none.

The defendant was sober at the time. (Trans. P. 10.) While searching the defendant, the officer noticed Charles Bosler and Carl Kleinsmith standing farther back in the hall in front of a door leading to the back end of the Drug Store wherein the Post Office was located. Bosler had in his hand a piece of wire with which he admitted he was attempting to unlock the door. Bosler and Kleinsmith were thereupon taken into custody and before the officer could handcuff them to a telephone pole outside the hallway door, the defendant Steffen had escaped.

The officer further testified that he examined the door in question and that it was the door leading into the Drug Store and was scratched about the keyhole with marks similar to those made by the piece of wire found in Bosler's hand.

The other two defendants claimed at the time of the arrest that they thought the door opened into the picture show, but finally admitted that they knew it opened into the Drug Store. They also admitted that they were after the safe in the Drug Store, when the officer arrested them. (Trans. p. 13.) The safe in question was used in connection with the postal station and contained postal funds. (Trans. p. 40.)

There were found on the ground where the defendants Bosler and Kleinsmith had thrown them, while the officer was searching for Steffen, a vial containing nitroglycerin and other paraphernalia used for breaking into safes, which Bosler and Kleinsmith

later, in a written statement, admitted they had had in their possession. (Trans. p. 20-23.)

The defendant was arrested about the 21st of July, 1922, and upon being questioned by a Post Office Inspector, stated that he had an alibi for that night and could prove it by witnesses. (Trans. p. 27.)

After the Government had closed its case and the defense had commenced, the defendant Bosler testified on the witness stand that they took with them two vials of nitroglycerin, two caps and two fuses and a can of soap and that Steffen carried the caps and upon being questioned how Steffen happened to have the caps, said that he, Bosler, had asked Steffen what he would carry.

Testimony was also introduced to the effect that Steffen was left outside for a lookout (Trans. p. 66) and that Steffen was carrying the fuses as well as the caps and that Steffen took them and put them in his pocket before they started out.

At no time during the trial was Steffen's presence at the scene of the crime denied, but all three defendants testified that Steffen was intoxicated and did not know what was going on.

ARGUMENT.

The authorities are practically unanimous to the effect that in criminal cases in the Federal Courts the introduction of evidence by a defendant constitutes the waiver of a motion for a directed verdict made at the close of the Government's case, but this waiver does not affect the right of the defendant to have the sufficiency in law of the entire record con-

sidered upon a motion to direct made at the close of all the testimony.

Byrne Fed. Crim. Proc. section 311.
16 Corpus Juris 938, Section 2305;
Thlinket Pkg. Co. vs. U. S., 236 Fed. 109;
Kasle vs. U. S., 233 Fed 878;
Gould vs. U. S., 209 Fed. 730;
Leyer vs. U. S., 183 Fed. 102;
Kaye vs. U. S., 177 Fed. 147;
Burton vs. U. S., 142 Fed. 57;
Tucker vs. U. S., 224 Fed. 833.

It appears from the above authorities that in reviewing the decision of the District Court, the Government's evidence is not segregated from the remainder of the testimony and examined to see whether or not it is sufficient to form a basis for a verdict of guilty, but on the contrary the entire record is considered and if evidence is introduced by the defense which tends to prove a material allegation in the indictment or to inculpate any of the defendants, then that evidence also is to be considered

In the case of Leyer vs. United States, cited above, the defendant was charged with having committed perjury in statements made by him under oath as to his property upon executing a bail bond. The particular statement was his declaration that on June 23, 1909, the day he executed the bail bond, he was the owner in fee simple of certain premises, giving the street address of the premises. The prosecution having proved the statement introduced a deed executd by the defendant on May 13, 1909, and recorded July 20, 1909, which deed purported to convey by metes and bounds certain lots; the deed, however, did

not give the street numbers of the lots and no evidence identifying the land described in the statement and the land described in the deed was introduced. Thereupon, defendant's counsel moved the court to acquit the defendant on the ground of insufficient evidence. The motion was denied and exception reserved.

It will thus be seen that the Government's chain of proof was defective in that it had proved that defendant had executed a deed to property on May 13, 1909, but had failed to prove that the deed had been delivered and title passed prior to the time when the defendant swore that he owned it. Since it had not been recorded until nearly a month later, it might fairly be inferred that it had not been delivered until after he had made the affidavit upon which the title was found. The defendant, however, did not stand upon his exception but proceeded to put on evidence in defense.

At the close of the entire case, motion to acquit was again made and, upon its denial, was relied upon in the prosecution of writ of error. The defendant's own testimony removed any question as to the identity of the parcels of land mentioned in the deed with the land described in the affidavit and testimony was introduced by the defendant to the effect that it was delivered on the same date as executed. The Appellate Court in considering the case, decided that the defendant had himself supplied the missing link in the Government's chain of evidence and that there was therefore sufficient evidence to go to the Jury.

In the case at bar, we are not interested at this time in the question as to whether or not at the close of the Government's case, there was sufficient evi-

dence to warrant submitting the case as to this defendant to the Jury. What we are now concerned in is whether or not all of the evidence, both that submitted by the Government and that by the defense, taken as a whole, was sufficient to warrant its consideration by a jury. We have these facts: First, a Post Office substation was located within the door the defendants were trying to force. Second: The defendant Steffen carried with him to the scene of the crime, caps and fuses to be used in exploding the safe. Third: After the arrival at the scene of the offense, he acted as lookout. Fourth: Conflicting testimony is offered as to the sobriety of the defendant at the time.

The Government's testimony was to the effect that he was sober. Testimony for the defense claimed that he was so intoxicated that he did not know what he was doing. The whole question arising out of the testimony is whether the defendant Steffen was so intoxicated he did not know what he was doing or what the plan of his associates was. Upon that particular point, there is conflicting evidence and it being a question of fact and not of law, we contend that it was properly submitted to the jury for their decision. If no defense had been offered and the defendant had rested at the conclusion of the Government's testimony, there might have been more merit to his contention, but, as in the Leyer case, the defense supplied many elements that were lacking in the Government's case.

We, therefore, respectfully submit that the Court ruled properly in refusing to direct a verdict of not guilty to the defendant Steffen and that the trial court's action should be affirmed.

Respectfully submitted,

JOHN S. COKE,
United States Attorney,

THOS. H. MAGUIRE,
Assistant United States Attorney.